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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
and	)	
Amendments to Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

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REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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REPLY COMMENTS OF
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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby files these reply comments in response to the Commission's Third Notice of Proposed Rulemaking[1] in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The comments of the local exchange carriers ("LECs") in response to the Third Notice reveal a cynical attempt to use alleged capacity shortfalls to argue for the kind of control over programming that is fundamentally inconsistent with the common carrier video platform

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[1] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking (rel. Nov. 7, 1994) ("Reconsideration Order" or "Third Notice").

contemplated by the Commission. The LECs self-servingly posit a platform with limited analog capacity and conclude that, allegedly to promote efficiency and ensure commercial viability, they should be permitted to select and package the programming carried on the platform. The LECs' proposals stray far from the nondiscriminatory access that is the hallmark of video dialtone. They should not, under the guise of managing a shortage of usable channels, be permitted to designate or serve as a packager of programming services with exclusive or preferential access to their scarce analog channels. They should not be permitted to make the editorial choice that a home shopping broadcast station is more "popular" than The Learning Channel and therefore more deserving of inclusion in a program package. They should not be permitted to allocate competing sports or movie services between analog and digital channels. Rather, programmers should be accorded free rein to structure their service offerings as they see fit.

Unproven claims of capacity shortfalls provide no justification for reformulating video dialtone into the functional equivalent of a cable system without the franchise and other requirements. If the telcos wish to operate as cable operators, they should be regulated as cable operators and required to undertake the responsibilities imposed upon cable operators by Title VI of the Communications Act.

Arguments for preferential access to the platform are likewise inconsistent with the common carrier nature of video dialtone. Recognizing its fundamental incompatibility with the bedrock principle of nondiscrimination, the Commission has already twice refused to grant certain classes of programmers preferential treatment on video dialtone platforms. The record in this proceeding only strengthens the basis for the Commission's previous decision to reject such preferences. Neither the Constitution, the Communications Act, nor the public interest permit the Commission to mandate special treatment or advantages for selected video dialtone programmers that are unavailable to other programmers. The Commission's resolve to ensure that LECs offering video dialtone service "make available to all service providers the same service offerings and functionalities on the same terms and conditions"[2/] would be completely eradicated by a policy of preferences. Authorizing the LECs to grant voluntary preferences would create an even greater risk of discrimination, since the telcos would have unfettered discretion to favor programmers most willing to conform their offerings to LEC wishes.

The Commission's recognition in the Third Notice that it cannot bar telco acquisition of in-region cable facilities in markets where two-wire competition is unsustainable requires the establishment of clear rules that delineate for cable operators, telcos, and capital markets a range of permissible transactions. Case-by-case review of all proposed telco acquisitions of cable facilities is impractical, economically inefficient, and administratively burdensome. The Commission should establish a rule permitting such acquisitions in markets below 50,000 persons, and only engage in case-by-case review of proposed transactions in markets that exceed that population threshold.

The record in this proceeding contains considerable evidence demonstrating that LECs are willing to use their control over pole and conduit space to thwart the type of two-wire, multiple service competition between cable operators and telcos envisioned by the Commission. Accordingly, the Commission must adopt new rules designed to prevent telephone companies

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2/ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781, 5810-11 (1992) pets. for review pending sub nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 et al. (D.C. Cir. Sept. 9, 1992)("Video Dialtone Order").

offering video dialtone service from leveraging their control over pole and conduit space in a discriminatory manner.

I. THE COMMISSION MUST NOT PERMIT PROPOSALS STYLED AS CAPACITY ISSUES TO ERODE ITS POLICY FRAMEWORK FOR VIDEO DIALTONE

The comments submitted by the telcos in this proceeding reflect their continued effort to hasten a Commission retreat from the hallmark principles underlying the video dialtone policy framework: nondiscriminatory treatment of all programmers and the expansion of capacity to meet demand.[3/] Even before video dialtone service has actually been offered to the public on a commercial basis, the LECs have succeeded in fostering an extensive debate over how policymakers and programmer-customers should respond to projected shortages of analog channels. The LEC proposals for addressing capacity shortfalls are so completely untethered from the common carrier framework underlying video dialtone that they should not even be described as "video dialtone." The Commission must either reject these proposals out-of-hand, or approve them only upon the condition that the telcos comply with the requirements of Title VI.[4/]

3/ Reconsideration Order at ¶ 36; Video Dialtone Order, 7 FCC Rcd. at 5787.

4/ Cf. Letter from David J. Markey, Vice President-Governmental Affairs, BellSouth, to Hon. Reed E. Hundt (Dec. 22, 1994) at 2 (given "relative shortage" of analog capacity, telcos must be able to offer "programming packages comparable to cable's") (emphasis supplied). In response to the Fourth Notice of Proposed Rulemaking in this docket, see Report No. DC 95-14 (rel. Jan. 12, 1995), NCTA will provide more extensive comments on the appropriate regulatory treatment of the selection, packing, and delivery of video programming by a telco.

At the heart of the telcos' argument is a kind of capacity Catch-22: they assert that the digital delivery of video programming is presently neither technically nor commercially viable[5/] after having determined to provide only a limited number of analog channels. Rather than respond to this scarcity of critical capacity via expansion -- as is seemingly dictated by the Commission's video dialtone framework -- the LECs have offered a series of proposals in which either the LEC itself, or a third party selected by the LEC, would develop and manage a package of common programming services to be distributed over the analog channels.

In sum, the telcos propose to address the alleged shortage of usable channels on their platforms by avoiding the fundamental common carrier requirements of video dialtone service. In the name of efficient channel utilization, they would offer a package of channels selected according to their own criteria and controlled by a single programmer they choose. This package would be distributed over what the LECs themselves concede to be the most commercially and technically valuable channels on their systems -- in some instances to the

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[5/] By contrast, their video dialtone applications maintained that digital systems were already available. See, e.g., Application of Bell Atlantic, W-P-C 6966 (June 16, 1994) ("Bell Atlantic Application") at 3.

detriment of other potential packagers.[6] It is obvious that the LECs are seeking to offer cable service rather than video dialtone service. Their "channel sharing" proposals must be rejected.

A. TO THE EXTENT THAT DIGITAL CAPACITY REMAINS COMMERCIALLY AND TECHNICALLY INFEASIBLE, ANALOG CHANNELS MUST BE ALLOCATED IN A WHOLLY NON-DISCRIMINATORY MANNER

In the Third Further Notice, the Commission noted that cost and technological issues raise doubts about the current commercial feasibility of digital distribution of video programming to subscribers.[7] The comments received in this proceeding from telcos planning to offer video dialtone suggest agreement with that assumption.[8] GTE notes specifically that "the immediate

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6/ For example, US West's application asserts that the allocation of analog channels among multiple packagers is economically infeasible. See US West Comments at 6-7 ("US West proposes that rather than sharing only a portion of the 77 analog channels and allocating the remainder among multiple providers, the entire complement of 77 channels be shared and made available to any video information provider ('VIP') interested in delivering analog-based content to end users."); see also Amendment to Application of US West, W-P-C No. 6921, October 25, 1994 at 7 ("US West is unaware of any economic means of expanding analog capacity should 77 channels be insufficient to satisfy demand."). By requiring any programmer occupying an analog channel to make its programming available to any VIP, US West will effectively discourage the development of multiple packagers and severely restrict the ability of programmers to control the manner in which their programming service is bundled and marketed to end users.

7/ Third Further Notice at ¶ 268.

8/ Southwestern Bell Comments at 3-4; Southern New England Telephone Comments ("SNET Comments") at 2-3; US West Comments at 10, 15-18; GTE Comments at 8 ("though technically available, the placement of digital equipment at each and every television set on a subscriber's premise is likely to be cost prohibitive until the 1998 timeframe"); NYNEX Comments at 10 (noting that "[a]t the present state of technical development," digital distribution of video programming is "an uneconomic prospect").

The telcos' skepticism regarding the near-term technical and commercial viability of digital technology is not shared by all commenters. Broadband Technologies, a company whose attempts to sell digital equipment to the telcos have apparently met with only limited success, contends that digital distribution in the near-term is commercially and technically viable because (continued...)

requirements of video programmers . . . will require reliance on the use and delivery of analog signals to local programming subscribers . . .".[9/] Ameritech suggests that its network's analog channels are critical to market acceptance of video dialtone by both programmer-customers and consumers.[10/] Pacific Telesis estimates that it may take "as many as 15 or 20 years" before digital transmission becomes a complete substitute for analog distribution.[11/] US West states that "in the near and intermediate term," digital delivery is "expensive for both the network operator and the video information provider and could present some significant problems for end users."[12/] While underscoring the vital importance of analog capacity, the telcos also are continuing their efforts to persuade the Commission to acquiesce to projected shortages of that critical resource.[13/]

The telcos' emphasis on the near-term commercial infeasibility of digital technology and the projected scarcity of analog capacity reinforces the necessity of remaining faithful to the

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8/ (...continued)
digital technology is "now or will be available shortly at reasonable prices." Broadband Technologies Comments at 3; see also id. at 19-20 (describing roll-out schedules for digital set-top converters). Significantly, a number of cable companies have already begun field tests of digital technology. See, e.g., "Time Warner's Time Machine for Future Video," The New York Times, Dec. 12, 1994 at D1, col. 3. While the near-term commercial prospects for digital video technology may be far more positive than the telcos believe, it is evident that non-discriminatory access to analog capacity will be crucial during the start-up phase of their video dialtone networks.

9/ GTE Comments at 10.

10/ Ameritech Comments at 3.

11/ Pacific Telesis Comments at 4.

12/ US West Comments at 10.

13/ See, e.g., BellSouth Comments at 1.

nondiscrimination principle underlying the Commission's video dialtone policy framework. Because of both their acceptance in the marketplace among programmers and consumers and the likelihood that on many systems demand for analog channels will exceed supply,[14/] analog channels must be allocated in a completely fair and nondiscriminatory manner.[15/]

The telcos' proposed response -- to select and package the programming distributed on those channels -- is fundamentally inconsistent with this need. Telcos that engage in such activities, moreover, are no longer offering video dialtone service; they are cable operators squarely within the jurisdiction of Title VI.

B. LECs MUST BE BARRED FROM ANY DIRECT OR INDIRECT ROLE IN THE DEVELOPMENT AND ADMINISTRATION OF CHANNEL-SHARING ARRANGEMENTS

In its initial comments, NCTA noted that market-based channel-sharing arrangements developed solely by programmer-customers without any direct or indirect LEC involvement may

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14/ In instances where demand for analog capacity exceeds supply, Ameritech suggests that it is relatively easy for video dialtone providers to reconvert digital channels into analog channels. Id. at 5 ("the reallocation of digital channels within a video platform to deliver analog channels is another solution to analog capacity shortages. It is possible to increase the number of analog channels by reducing the number of digital channels."). Accordingly, the Commission should look skeptically upon claims by LECs that expanding the number of analog channels to meet projected capacity shortfalls is technically infeasible and economically unreasonable. See NCTA Comments at n. 28. Such skepticism is particularly appropriate where the telcos themselves have created the "scarcity" of analog channels. See Bell Atlantic Application at 4, limiting analog capacity to 37 channels; New England Telephone and Telegraph Company Application, W-P-C 6983 (July 8, 1994) at 6, limiting analog capacity to 20 channels.

15/ The lack of functional equivalence between analog and digital -- particularly at the critical start-up phase of video dialtone networks -- makes it especially incumbent upon the Commission to ensure that cable services have the same opportunity to obtain carriage on analog channels under the same rates, terms and conditions as any other potential video dialtone programmer. This concern is heightened by recent reports of telco plans to develop and market video programming. See, e.g., "3 Baby Bells, Disney May Link Up To Market and Deliver Video Programming," Wall St. Journal, January 16, 1995 at A3.

prove to be an efficient means of dealing with capacity shortfalls in a manner that is consistent with the Commission's video dialtone policy framework.[16] Other commenters note that channel-sharing arrangements are not per se objectionable, so long as the telcos are excluded from any involvement in their development or management.[17] They also agree that any direct or indirect LEC role in the selection of programming for shared channels or the management of such arrangements creates undue risks of discrimination and/or triggers Title VI obligations:

> Any channel-sharing mechanism that involved the LEC in selecting programming would render the video dialtone operator a cable operator. It would also tend to conflict with the common carrier model of video dialtone service. Thus, any such mechanism must operate without involving the video dialtone operator, an affiliate, or a unique "anchor programmer" designee, in the selection of programming.[18]

The telcos' description of the manner in which their channel-sharing proposals would work in practice demonstrates the irreconcilability of those proposals with the Commission's video dialtone policy framework. A number of LECs explicitly acknowledge their desire to

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[16] See NCTA Comments at 14-15. NCTA agrees with Viacom that any channel-sharing arrangements permitted by the Commission must not in any way usurp or erode the right of program service owners to control the terms and conditions under which their product is licensed for distribution to subscribers. Viacom Comments at 9-10. NCTA believes that only market-based channel-sharing arrangements developed and administered by programmers themselves would effectively ensure that such rights are safeguarded.

[17] AT&T Comments at 6-7 ; Comments of Adelphia Communications Corp., Comcast Cable Communications, Inc., Cox Enterprises, Inc., Jones Intercable, Inc. ("Joint Parties") at 5-6; California Cable Television Association Comments ("CCTA Comments") at 5.

[18] Comments of the Alliance for Communications Democracy; the City of Ann Arbor, Michigan; the City of Fort Worth, Texas; Montgomery County, Maryland; and Somerville Community Access Television ("Alliance for Communications Democracy Comments") at 14-15; see also AT&T Comments at 7; Joint Cable Parties at 6-7; Joint Comments of the Atlantic Cable Coalition, The Cable Television Association of Georgia, The Great Lakes Cable Coalition, The Minnesota Cable Television Association, The Oregon Cable Television Association, The Tennessee Cable Television Association, and The Texas Cable TV Association ("Joint Comments") at 11-13.

delineate the criteria by which programming services are selected for common channel arrangements and to either act as the common channel administrator themselves or exercise control over the selection of the shared-channel manager.[19] For example, Southwestern Bell asserts that any shared channel administrator should be selected by the LEC according to its own criteria, and that "whoever the LEC selects to administer the shared channel capacity should select the programming to be carried on it.[20] Southwestern states expressly that the process of programming selection for shared channels "should permit the LEC to fashion a structure which will be most responsive to the market in which it finds itself."[21] Clearly, Southwestern seeks to control the selection and packaging of the programming services to be distributed over its most valuable channels. In essence, Southwestern seeks to ignore the common carrier framework established by the Commission for video dialtone and engage in the full panoply of

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[19] Southwestern Bell Comments at 9-10; Pacific Telesis Comments at 5-7; NYNEX Comments at 13; SNET Comments at 5-6.

[20] Southwestern Bell Comments at 9-10.

[21] Id. at 10.

Title VI functions.[22] It cannot, however, do so without obtaining a franchise and otherwise complying with Title VI.[23]

Other LECs express similar aspirations to exercise dominion over both the selection of the shared channel manager and the programming services selected for the common channels. In its comments, Pacific Telesis suggests that video dialtone network providers should select shared channel administrators willing to undertake performance requirements that include "committing to include off-air, and [PEG] channels as part of the shared channels...".[24] SNET proposes that the Commission permit LECs to select a common channel manager for up to 30 analog channels and that only "popular programming" should be permitted on those shared

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22/ Indeed, Southwestern is explicit regarding its desire to utilize channel-sharing arrangements to engage in Title VI functions. Southwestern states that channel-sharing arrangements must be structured so as to permit the provision of "the same (or more) services as the cable company with the same ease of access and similar prices...". Id. at 6. Southwestern also asserts that its "consumer research has found that the competitive viability of noncable video services is tenuous without restrictions on programming choice," id. at 10 (emphasis added), which Southwestern itself clearly seeks to impose.

Of course, the direct or indirect imposition by a LEC of "restrictions on programming choice" completely contravenes the common carrier vision underlying video dialtone.

23/ See National Cable Tel. Ass'n v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994).

24/ Pacific Telesis Comments at 6. In its video dialtone application, Pacific Bell proposed to set aside 10 to 15 analog channels for over-the-air broadcast stations which would be administered by an entity affiliated under common ownership with its proposed anchor programmer. See id. at 5 & n.9; NCTA Comments at n. 32. Pacific Bell has been explicit regarding its desire to administer the shared channels itself, see Pacific Telesis Comments at n. 11, and holds an option to purchase Anchor Pacific, the channel manager on its proposed video dialtone system. See CCTA Comments at 6-7.

channels.[25] US West proposes to supply facilitators that will lead the decision-making regarding the programming services selected for its 77 analog channels, and the channel positioning of those programming services.[26] Apparently there would be no analog capacity for unaffiliated programmers or those not selected to be part of the complement of shared channels.[27]

Channel-sharing arrangements that grant advantages to certain programmers violate the common carrier requirement that a LEC's video dialtone capacity be provided "indifferently" to all would-be programmer-customers under similar terms and conditions.[28] Most LECs intend that these channels be distributed over scarce analog capacity and marketed as a gateway service to other packages offered by programmer-customers. Thus, programmers excluded from consideration or selection in shared channel packages risk being at a distinct marketing disadvantage relative to those programmers who are considered or selected for such arrangements. The pressure on programmers to seek to become part of such arrangements will be strong and thus the concomitant risk of discrimination will be heightened.

It is clear that any LEC role in, or influence over, the choice of programming for the shared channels not only carries significant risks of discrimination, but also runs afoul of the

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25/ SNET Comments at 5-7. SNET proposes that the LEC should be permitted to act as the shared-channel manager if no other entity is willing. Id. at 6. SNET also proposes that the shared channel manager be required to resell its programming at cost (without a profit) to any other programmer on the video dialtone system. Id. at 7.

26/ US West Comments at 6-7.

27/ See supra at n.6.

28/ NCTA v. FCC, 33 F.3d at 75; National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976).

Commission's bar against telcos to "select video programming by determining how programming is presented for sale to consumers."[29] Equally impermissible are proposals entailing direct or indirect LEC involvement in the choice of the common channel manager, particularly since most LECs propose to include programming service characteristics and content considerations as part of the selection criteria.[30]

Tellingly, most LEC commenters do not even seriously attempt to reconcile their channel-sharing proposals with the Commission's legal and policy framework for video dialtone. For example, the telcos make no effort to harmonize granting local broadcasters privileged access to shared analog capacity with the Commission's requirement that LECs "make available to all service providers the same service offerings and functionalities on the same terms and conditions."[31]

The telcos' efforts to defend their role in the selection of the common channel administrator also are unpersuasive. For example, SNET contends that any discriminatory concerns arising from LEC selection of the common channel administrator "would be moot in most cases . . . because it is unlikely that more than one party would seek to become the [shared

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[29] Video Dialtone Order, 7 FCC Rcd. at 5789.

[30] The Commission's implicit suggestion elsewhere that there may be some circumstances under which the LECs can choose a common channel manager is misplaced. See In the Matter of the Applications of Ameritech Operating Companies, File Nos. W-P-C 6926-6930, January 4, 1995, at ¶ 24 (rejecting Ameritech's channel sharing proposals because of lack of clarity regarding criteria by which Ameritech would select the Common Channel Manager). Any direct or indirect LEC involvement in the selection of a shared channel manager would violate the Commission's common carrier framework; provide that channel manager with the incentive to discriminate in favor of the LEC; and impermissibly involve the LEC in the selection of programming.

[31] Video Dialtone Order at 5810-11.

channel manager] since [it] would be barred from reselling its programming...at a profit."[32] Of course, under SNET's proposal, the LEC itself may manage the shared channels if no other entity meeting its proposed criteria desires to do so.[33] Thus, rather than diminish the prospects of discrimination, SNET's proposed restrictions on for-profit resale would heighten them by enhancing the probability that only the LEC itself would seek to become the shared channel administrator.

Southwestern Bell claims that administration of the shared channels by the LEC -- or a programmer-customer selected by the LEC -- does not violate the cable/telco cross-ownership ban because it does not constitute the "direct provision" of video programming to subscribers by common carriers.[34] Similarly, SNET contends that LEC selection of a common channel manager does not implicate Title VI because "the LEC would not determine how video programming is presented for sale to subscribers since the LEC would not sell programming to subscribers."[35] Yet the telcos would determine the number of analog channels on the platform[36] and the channel placement of programming services.[37] It cannot be seriously

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32/ SNET Comments at 9.

33/ Id. at 6.

34/ Southwestern Bell Comments at 7-8.

35/ SNET Comments at 9. SNET concedes that direct LEC administration of shared channels would require a waiver of the cross-ownership ban. Id. at 10.

36/ See note 14, supra.

37/ See, e.g., NYNEX application at Exhibit G at y-2 ("VHF channels will retain their channel numbers, but UHF channels will be assigned to the lowest available slot"); Opposition of Bell Atlantic to Petitions to Deny and Response to Comments, Statement and Protest, W-P-C 6966, at n.49 ("Bell Atlantic currently anticipates that it will be able to carry the signals of local (continued...)

argued that LEC selection of a single entity designated to develop and offer a package of programming services chosen in accordance with LEC-generated criteria that includes explicit advantages for certain types of programmers nonetheless excludes the LECs from decisions regarding how video programming is presented to subscribers.

It is clear that the sum of the telephone companies' channel-sharing proposals is designed to provide the LECs with the opportunity to exercise varying degrees of control over decisions about how video programming is selected, packaged, tiered, or bundled for subscribers. Once the telephone companies engage in such functions, they are no longer providing video dialtone service and must instead proceed under Title VI.[38/] The Commission cannot remain faithful to the strictures of its video dialtone framework while permitting direct or indirect LEC involvement in channel-sharing arrangements.[39/] Accordingly, it must reject the channel-sharing arrangements proposed by the LECs.

[37/] (...continued)
VHF broadcast stations choosing 'will carry' service in their usual channel position, although local UHF signals may require random or other nondiscriminatory reassignment to lower channel numbers.").

[38/] See Video Dialtone Order at 5817; NCTA v. FCC, 33 F.3d at 75; NCTA Comments at 5.

[39/] The Joint Commenters suggest that even where the LECs are completely excluded from any involvement in the development or administration of channel-sharing arrangements, Title VI obligations are still implicated and risks of discrimination persist. Joint Comments at 13, 15. NCTA agrees that in some circumstances such obligations and risks may still be present even under channel-sharing arrangements developed and administered solely by programmer-customers without any direct or indirect LEC involvement. But while discriminatory risks and Title VI obligations may potentially arise in the context of market-based channel-arrangements among programmer-customers, they are inherently present whenever the LECs have any role in such arrangements.

II. PREFERENCES FOR CERTAIN CLASSES OF PROGRAMMERS ARE CONTRARY TO THE FIRST AMENDMENT, THE COMMUNICATIONS ACT, AND THE PUBLIC INTEREST

To this point, the Commission has resisted entreaties from certain classes of programmers seeking mandated preferential access and special rates on video dialtone networks.[40] In particular, the Commission has indicated that it has rebuffed the request for special treatment from broadcasters and PEG programmers because there has been no "compelling showing of need and strong public policy concerns" in support of granting preferences to certain programmers.[41] Nothing submitted in response to the Third Notice provides any basis for the Commission to depart from its prior decisions declining to grant preferential rates or access to select categories of programmers. If anything, the record in this proceeding only further strengthens the constitutional, statutory and policy bases for refusing to grant such privileges.

As a threshold matter, a number of commenters advance the misplaced notion that the First Amendment implications of preferential access proposals are insubstantial in this context because such proposals do not seriously trammel upon the rights of the telcos.[42] In fact, as the Supreme Court expressly ruled in Turner Broadcasting, preferential access proposals most directly affect the First Amendment rights of other programmers deemed ineligible for the

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40/ Video Dialtone Order, 7 FCC Rcd. at 5805; see also Reconsideration Order at ¶ 255.

41/ Id.

42/ See, e.g., Comments of Center for Media Education, Consumer Federation of America, Media Access Project and People for the American Way ("CME Comments") at 12; Association of America's Public Television Stations ("APTS") at 6-7;

preferences.[43] The constitutional infirmities of preferential access proposals for broadcasters, noncommercial, and PEG programmers arise because of their impact on cable programmers, who are demoted to second-class status on the video dialtone platform and forced to surmount additional technical, economic, and marketing burdens in order to transmit their messages to subscribers.[44]

The commenters arguing on behalf of broadcasters and PEG programmers have failed to proffer an articulable content-neutral basis for granting broadcasters preferred access over other cable programmers. Indeed, advocates of special treatment for broadcasters and PEG programmers focus on the programming content of those services in an effort to justify preferential treatment.[45] Because the proposals for preferential access to the video platform

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43/ Turner Broadcasting Sys., Inc. v. FCC, 114 S.Ct. 2445, 2456 (1994) (must carry rules regulate speech by rendering it more difficult for cable programmers to compete for carriage on the limited channels remaining).

44/ APTS' suggestion that preferential rates would not render it more difficult for non-preferred programmers to compete for carriage on the remaining channels simply denies reality. See APTS Comments at 7. Preferred access to VDT capacity -- particularly the highly valued analog channels -- for certain programmers will per se burden or reduce access opportunities (and thus speech opportunities) for non-preferred programmers.

45/ See, e.g., CME Comments at 7-8 (Noncommercial speech should be preferred because "[s]uch speech educates children, enlightens the spirit and assists the electorate in making wise and informed decisions at the ballot box."); Comments of the National Association of Telecommunications Officers and Advisors and the City of New York ("NATOA Comments") at 8 (Absent preferences for PEG programmers, "the public will receive primarily commercial programming of national interest, at the expense of local public programming in the local public interest..."); Comments of the Alliance for Community Media and the Office of Communication of the United Church of Christ ("PEG Access Coalition") at 9 (Preferences for PEG programmers are needed because the "majority of satellite-based programming, while offering some superficial diversity in terms of subject matter, is primarily for-profit and entertainment oriented, and lacks both the multiplicity of voices and attention to local affairs that is characteristic of PEG use."); Comments of the National Association of Broadcasters ("NAB Comments") at 4 (Arguing for preferences because local broadcast stations provide "a vibrant, local service to all viewers...".); APTS Comments at 17-18.

are content-based, such preferences would have to survive a more exacting level of First Amendment scrutiny than the must-carry rules have thus far failed to satisfy.

Even if a content-neutral basis for preferences could be advanced, the pleas for special treatment on behalf of commercial broadcasters, public broadcasters and PEG programmers cannot obscure the complete absence of an evidentiary basis for such preferences, which commenters agree is critical to a finding that such preferences are lawful under either the First Amendment or the Communications Act.[46] It is virtually impossible -- consistent with the showings required by both the First Amendment and the Communications Act -- to establish a factual basis for mandating preferential treatment for certain programmers in connection with a service that has never actually been offered.[47]

Those commenters arguing for mandatory preferential treatment for broadcasters appear to believe that the mere assertion of a governmental interest purportedly being served by such preferences renders them permissible under the First Amendment.[48] The Supreme Court

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[46] See, e.g., Joint Comments at 25-26; Southwestern Bell Comments at 14-18; US West Comments at 23; AT&T Comments at 8-9.

[47] NCTA Comments at 24; see also BellSouth Comments at 7-8; US West Comments at 24:

> Furthermore, VDT offerings are not yet even off the ground and it is impossible to tell whether they will fulfill a market need or will be a total failure. It is impossible to tell whether they will meaningfully increase the programming choices available to the American people . . . . It is clearly impossible to predict -- at this early point in time -- that the absence of mandated-preferred access on VDT platforms 'will likely deny the American public meaningful access to noncommercial and other nonprofit programming.'

Id. (emphasis in original).

[48] See, e.g., NAB Comments at 8; APTS Comments at 10; NATOA Comments at 4-7.

declined to rule that the mere assertion of that interest sufficed to enable the must-carry rules to withstand First Amendment scrutiny, but instead required a showing that the rules were designed to redress demonstrable harms "in a direct and material way."[49] At a minimum, a similar showing would be required in order for video dialtone broadcaster preferences to survive First Amendment scrutiny.[50] None has been -- nor could be -- advanced here.[51]

Commenters' efforts to justify such preferences under the Communications Act are similarly unpersuasive.[52] NAB (most of whose members are commercial programmers) makes only a passing effort to ground preferences in Title II, implicitly acknowledging that neither Section 201(b) nor 202(a) would permit the Commission to treat one class of for-profit video dialtone programmers more advantageously than any other class of for-profit programmers.[53] Some noncommercial programmers requesting preferential treatment note that Section 201(b) permits separate classifications for the provision of common carrier services

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49/ Turner Broadcasting, 114 S.Ct. at 2470. The Court determined that only if it could be shown that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry" could the rules survive First Amendment scrutiny. Id.

50/ Unsurprisingly, NAB advances the novel argument that the absence of any record regarding the manner in which video dialtone systems will operate supports the grant of preferential access to broadcasters. See NAB Comments at 4. There is no legal merit to this argument.

51/ Indeed, the issue presented here is similar to that confronted in Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 8-9, appeal pending, No. 93-5290 (D.C. Cir.) in which the court flatly invalidated the Cable Act's application of a mandatory capacity set-aside for noncommercial programmers by Direct Broadcast Satellite ("DBS") providers, because there was "absolutely no evidence in the record" for the court to conclude that such preferences needed to be imposed in the DBS context.

52/ NAB Comments at 6-7.

53/ See NCTA Comments at 21-22.

to users.[54] Other commenters note that Section 202(b) does not bar all price differences for the provision of "like" common carrier services to users.[55] At a minimum, however, it is clear that differential treatment in the provision of common carrier services -- under either Section 201(b) or 202(a) -- is only permissible where there is a strong basis for concluding that disparate treatment is demonstrably necessary.[56] In this instance, there is no basis for such a conclusion.[57] As BellSouth noted:

> The affordability of VDT access will be a function of the rates filed by LECs. It is not yet apparent what the prevailing rate levels will be for VDT. There is, therefore, no

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[54] See APTS Comments at 4-5; Alliance for Communications Democracy Comments at n. 8.

[55] CME Comments at 12-13; PEG Access Coalition Comments at 15.

[56] See NCTA Comments at nn. 45-48; Reconsideration Order at ¶ 255 (exceptions to the nondiscrimination provisions of the Communications Act are permissible only where there is "a compelling showing of need and strong public policy concerns"). APTS concedes that a party seeking a separate classification under Section 201(b) must demonstrate it would otherwise be impaired from distributing its telecommunications services under commercial rates. APTS Comments at 5.

[57] APTS suggests that Section 396(h) of the Communications Act supports granting public broadcasters preferential rates for video dialtone service. APTS Comments at 13. By its own terms, Section 396(h) only authorizes the Commission to permit reduced rates for "interconnection services." 47 U.S.C. § 396(h)(1). Interconnection services are the technical means of "making programs available to and between local stations" in order to establish a national network. See The Public Broadcasting Act of 1967, Pub. L. No. 90-129, H.R. Rep. No 90-572 at 18. Thus, preferred rates were authorized only for a narrowly-defined service and only after Congress specifically found that general rates for that service would thwart the establishment of a national public television network. The Commission cannot and should not transform this specific authorization into a broad grant of preferential access for public broadcasters to other common carrier services.

factual basis for finding that preferential rates will be necessary to assure that a preferred class of programmers can afford VDT.[58]

Commenters supporting mandatory preferences also ignore the fact that all programmers deemed ineligible for such preferences would be subjected to blatant discrimination that is completely at odds with the common carrier policy framework for video dialtone. The Commission's determination to structure video dialtone as a programming distribution service in which telcos "make available to all service providers the same service offerings and functionalities on the same terms and conditions" is wholly undermined by mandatory preferences for certain programmers.[59] In addition, as the Commission has recognized, the establishment of preferential rates for some programmers means that those programmers deemed ineligible for such preferences will pay higher video dialtone rates, which could reduce the breadth of programming distributed to subscribers and impede the development of VDT systems.[60] There is no compelling policy rationale for requiring all other VDT programmers to subsidize the distribution costs incurred by commercial and public broadcast stations,[61] each of which already benefit from public subsidies and have ample sources of private funding. Moreover, it would adversely affect the quality of non-broadcast programming services if

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[58] BellSouth Comments at 7-8. See also Joint Comments at 26 ("any claims that local broadcasters or non-profit programmers cannot afford carriage on video dialtone systems absent special rates or subsidies are being made in the absence of any announced commercial video dialtone rates -- no LEC has filed a tariff for commercial video dialtone service indicating what carriage will cost").

[59] Video Dialtone Order, 7 FCC Rcd. at 5810-11. Tellingly, in the video dialtone context, the Commission did not permit or authorize the establishment of classifications or the "reasonable" discrimination authorized under Sections 201(b) and 202(a).

[60] See Reconsideration Order at n. 480.

[61] See Comments of Home Box Office at 12-13.

providers of those services were forced expend a disproportionate share of their resources for access to the video platform. There is no basis for this discrimination, which could especially impede the introduction and development of new programming services.

Finally, even the commenters supporting mandatory preferences for certain programmers are skeptical of giving the telcos the discretion to determine which programmers would be eligible for preferential access.[62] CME affirms NCTA's view that proposals such as Bell Atlantic's will-carry plan violate Title II and would trigger Title VI obligations.[63] Moreover, discretionary preferences create an even greater risk of discriminatory conduct by LECs, since the telcos would possess the sole authority over whether to grant privileges to certain programmers. There is no basis for concluding that voluntary preferences are permissible under either Title II or the Commission's video dialtone policy framework.

III. THE RECORD SUPPORTS PERMITTING TELEPHONE COMPANIES TO ACQUIRE IN-REGION CABLE FACILITIES IN MARKETS BELOW 50,000 PERSONS

In the Third Notice, the Commission acknowledged the need to establish a policy permitting telco "acquisitions of cable facilities in markets in which two wire-based multi-channel video delivery systems are not viable...".[64] In its initial comments, NCTA submitted an economic analysis demonstrating that two-wire competition is unsustainable in markets below

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[62] CME Comments at 16-19; PEG Access Coalition Comments at 23; see also APTS Comments at 27 ("Allowing LECs unfettered discretion in deciding which entities will be granted preferential rates does raise concerns about possible discriminatory conduct.").

[63] CME comments at 18-19; see also Joint Comments at 23-24.

[64] Third Further Notice at ¶ 277.

50,000 inhabitants.[65] A number of other commenters support a population-based standard of a similar size.[66] Some commenters support the adoption of non-population based criteria which the Commission could apply in determining whether or not to permit in-region acquisitions of cable facilities.[67]

NCTA agrees that these are relevant in assessing the viability of two-wire competition in many communities, and may be particularly useful in determining whether a telco's purchase of a cable facility should be permitted in markets above 50,000 persons. However, applying these factors to every instance in which a telco proposes to acquire an in-region cable facility would be unduly burdensome and produce protracted delay and uncertainty that could jeopardize or prevent beneficial transactions. A blanket exception to the anti-buyout rules for markets below 50,000 persons will protect two-wire competition in markets where it is sustainable, while providing clear guidance to telcos, operators, and capital markets regarding permissible and impermissible transactions.

65/ NCTA Comments at 29-32.

66/ See, e.g., Southwestern Bell Comments at 12 (in-region acquisition of cable facilities should be "seriously considered" in any area under 100,000 homes); GTE Comments at 15 (supporting 50,000 population standard); US West Comments at 20 (noting that the pending proposed increase in the rural exemption to markets of 10,000 persons is "too small" and "should be increased significantly").

67/ Ameritech suggests a formula based upon "density" -- the number of homes per plant mile -- and "composition" -- the percentage of distribution network facilities that are aerial versus buried. According to Ameritech, a combination of low density and a low percentage of aerial facilities yields unacceptably high per-subscriber costs for a second entrant. Ameritech Comments at 7-8. SNET suggests a formula that takes into account population density (homes per route mile) and average household income in the area, noting that low-density and low-income communities are less likely to be capable of supporting two-wire competition. SNET Comments at 11.